STATE OF MICHIGAN

COURT OF APPEALS

PENNY RYMAL,

Plaintiff,

v

HERMAN BAERGEN and MTD SYSTEMS, INC.,

Defendant-Appellees

and

CLARK PRODUCTS, INC., and CLARK FOODSERVICE, INC.,

Defendants-Appellants.

FOR PUBLICATION
June 8, 2004
9:05 a.m.

No. 243795
Macomb Circuit Court
LC No. 2001-003226-NZ

PENNY RYMAL,

Plaintiff-Appellant,

v

HERMAN BAERGEN and MTD SYSTEM, INC.,

Defendant-Appellees

and

CLARK PRODUCTS, INC., and CLARK FOODSERVICE, INC.,

Defendants.

No. 248124
Macomb Circuit Court
LC No. 2001-003226-NZ

Official Reported Version

Before: Kelly, P.J., and Murphy and Neff, JJ.

KELLY, P.J. *(Concurring in part and dissenting in part).*

I respectfully dissent from the majority's decision that the trial court erred in granting summary disposition of plaintiff's retaliation claim against defendants MTD Systems, Inc., and Herman Baergen. First, plaintiff did not properly plead a retaliation claim under the CRA. Second, even if she had properly pleaded a retaliation claim, she failed to establish that she was engaged in a protected activity under the CRA. Third, plaintiff failed to establish a causal connection between the telephone calls to Brian Fraser and the adverse employment action. Finally, within the context of employment discrimination, the plain language of CRA, read as a whole, does not provide a cause of action against individuals under either article 2 or article 7.

I. Standard of Review

"The decision to grant or deny summary disposition is a question of law that is reviewed de novo." *Veenstra v Washtenaw Country Club,* 466 Mich 155, 159; 645 NW2d 643 (2002). "The interpretation and application of a statutory provision is a question of law that is reviewed de novo by this Court." *Id.* The following rules apply to judicial interpretation of the CRA:

> We read the CRA in light of the primary goal of judicial interpretation, which is to ascertain and give effect to the intent of the Legislature. If the plain and ordinary meaning of a statute is clear, judicial construction is neither necessary nor permitted. We may not speculate about the probable intent of the Legislature beyond the words expressed in the statute. If a statute provides its own glossary, the terms must be applied as expressly defined. When reasonable minds may differ with respect to the meaning of a statute, the courts must look to the object of the statute and the harm it is designed to remedy and apply a reasonable construction that best accomplishes the purpose of the statute. [*Barrett v Kirtland Community College*, 245 Mich App 306, 313-314; 628 NW2d 63 (2001) (citations omitted).]

II. Retaliation

To establish a prima facie case of retaliation under MCL 37.2701(a), a plaintiff must show:

> (1) that the plaintiff engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action. [*Meyer v Centerline,* 242 Mich App 560, 568-569; 619 NW2d 182 (2000).]

I agree with the majority that plaintiff's complaint is "fairly cursory." Although the word "retaliation" appears in Count I, the term is merely used to describe conduct that plaintiff identifies as sexual discrimination in violation of the CRA. More specifically, the word "retaliation" appears three times in Count I of plaintiff's complaint:

> 22. Plaintiff was sexually harassed and retaliated against by defendants' agent and employee, Defendant Baergen, throughout the course of her employment.

> 23. This sexual harassment and retaliation included, but is not limited to, unwelcome comments and conduct of an offensive and sexual nature directed at plaintiff, the creation of a hostile work environment, as described herein and constructively terminating plaintiff's employment withholding pay commissions due to her, based on her refusal to engage in a sexual relationship with Defendant Baergen.
>
> * * *
>
> 25. The conduct of defendants' agent and employee in sexually harassing and retaliating against plaintiff constitutes sexual discrimination in violation of MCLA 37.2101 et seq.

The alleged sexual harassment identified in Count I falls directly within MCL 37.2103:

> (i) Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
>
> * * *
>
> (*ii)* Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment . . . .
>
> *(iii)* The conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . .

While reference to a specific statutory provision is not required, plaintiff did not reference MCL 37.2701, which could have put defendants on notice that retaliation was being pleaded. More importantly, however, plaintiff did not allege that she was engaged in a protected activity or that a causal connection existed between the protected activity and the adverse employment action. Instead, plaintiff simply alleged quid pro quo and hostile work environment sexual harassment, two types of sexual discrimination prohibited by the CRA. As such, the complaint was insufficient to put defendants on notice that a retaliation claim was also being pleaded.

III. Protected Activity

I also disagree that the two telephone calls to Fraser constituted protected activity. MCL 37.2701 prohibits retaliation or discrimination against a person "because the person has *opposed a violation of this act*, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." (Emphasis added.)

In assessing whether plaintiff has established a prima facie case, the first inquiry is whether she engaged in protected activity sufficient to satisfy the first element. Plaintiff testified that she told Fraser:

> I felt that I was being harassed. I felt that I was being pushed out, and I wanted some help. I didn't think I could handle it.
>
> * * *
>
> I told him several instances with Herman where he had been out of line. He was disputing agreements that we had made.
>
> * * *
>
> I told him about the swearing. I told him about the—what I felt was unfair treatment and the argumentative nature that I was being treated with.

The entire conversation lasted approximately two minutes and plaintiff never indicated that she was being sexually harassed. With regard to the second call, plaintiff testified that she asked Fraser how the conversation went with Baergen. When Fraser indicated that Baergen said there was no problem, plaintiff told Fraser he was misinformed. Again, plaintiff did not indicate that she was being sexually harassed. An employee "must do more than generally assert unfair treatment." *Barrett, supra* at 318-319. An employee "must clearly convey to an objective employer that the employee is raising the specter of a claim of unlawful discrimination pursuant to the CRA." *Id.* at 319. "[G]eneric, non-sex-based" complaints are insufficient. *Id.* Therefore, plaintiff's two telephone conversations with Fraser were not protected activities under MCL 37.2701.

IV. Causal Connection

Even if plaintiff's telephone calls were protected activity, she failed to establish a genuine issue of fact with regard to a causal connection between the telephone calls to Fraser and the adverse employment action.

"To establish causation, the plaintiff must show that his participation in activity protected by the CRA was a 'significant factor' in the employer's adverse employment action, not just that there was a causal link between the two." *Barrett, supra* at 315. In *West v Gen Motors Corp,* 469 Mich 177, 184-187; 665 NW2d 468 (2003), our Supreme Court analyzed the requirements to establish a "causal connection" between protected activity and an adverse employment action. The Court concluded that a plaintiff "must show something more than merely a coincidence in time between protected activity and adverse employment action." *Id.* at 186.

In this case, there was no genuine issue of fact that plaintiff's telephone calls to Fraser were a significant factor in the employment actions taken against plaintiff. Viewing the facts in the light most favorable to plaintiff, the evidence clearly shows a long-term negative reaction to plaintiff's refusal to engage in a sexual relationship with Baergen. This activity did not cease after plaintiff called Fraser—it continued in a similar and like fashion. There is absolutely no evidence that the call to Fraser had anything to do with the subsequent adverse employment action. Rather, the evidence indicates that the adverse employment action was directly attributable to plaintiff's rejection of Baergen's initial proposition as she specifically alleges in paragraph 23 of her complaint.

V. Individual Liability

Finally, in the context of employment discrimination, the CRA does not provide a cause of action for retaliation against individuals under either article 2 or article 7.

"We construe an act *as a whole* to harmonize its provisions and carry out the purpose of the Legislature." *Macomb Co Prosecuting Attorney v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001). (Emphasis added.) The CRA is composed of eight articles that serve distinct purposes. Article 1 consists of definitions that apply to the entire act. The discriminatory actions prohibited by the CRA are set forth in articles 2 through 5, which individually contain definitions and rules only applicable to the type of discrimination addressed in that particular article: article 2 prohibits employment discrimination, article 3 prohibits discrimination in places of public accommodation, article 4 prohibits discrimination in educational institutions, and article 5 prohibits housing discrimination. There are three remaining articles: article 6 establishes the civil rights commission and its procedures, article 7 prohibits retaliation against a person who has taken action in opposition to a violation of the CRA, and article 8 provides additional rules for claims brought under the CRA.

The majority correctly asserts that this Court has construed article 2 to permit claims of employment discrimination to be brought only against employers, not individuals. *Jager v Nationwide Truck Brokers, Inc,* 252 Mich App 464; 652 NW2d 503 (2002). I agree that despite being strewn with references to the CRA generally, *Jager* only construes the language in article 2. Thus, its holding does not extend to any other article in the CRA, including article 7 that is at issue here. Nonetheless, *Jager* affects the application of article 7 within the context of employment discrimination claims.

MCL 37.2701 provides:

> Two or more persons shall not conspire to, or a person shall not:
>
> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.
>
> (b) Aid, abet, incite, compel, or coerce a person to engage in a violation of this act.
>
> (c) Attempt directly or indirectly to commit an act prohibited by this act.
>
> * * *
>
> (e) Willfully obstruct or prevent a person from complying with this act or an order issued or rule promulgated under this act.
>
> (f) Coerce, intimidate, threaten, or interfere with a person in the exercise or enjoyment of, or on account of his or her having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act.

The majority correctly observes that MCL 37.2701 uses the term "person" rather than "employer." But I disagree with the conclusions it draws from this observation. MCL 37.2701 must be viewed in light of its purpose in relation to the CRA as a whole. It is clear that article 7 operates as an umbrella to protect people in their "exercise or enjoyment of, any right granted or protected by this act." Thus, it protects people who are pursuing claims that arise from violations of articles 2 through 5. Employment discrimination is only one of these types of violations. Clearly, article 7 does not use the term "employer" because it does not serve only to protect people in pursuance of claims that arise only under article 2. Article 7 uses the broader term "person" because it protects people in pursuance of claims, arising under articles 2 through 5, brought against various entities, including employers, places of accommodation, educational institutions, persons engaged in real estate transactions, etc.

Because article 2 specifically prohibits employers from discriminating, in the context of employment discrimination, article 7 can only apply to employers. As noted by the majority, our Supreme Court outlined the basic principles underlying a sexual harassment lawsuit in the employment context:

> Through the Civil Rights Act, Michigan law recognizes that, in employment, freedom from discrimination because of sex is a civil right. MCL 37.2102; MSA 3.548(102). *Employers* are prohibited from violating this right, MCL 37.2202; MSA 3.548(202), and discrimination because of sex includes sexual harassment, MCL 37.2103(i); MSA 3.548(103)(i). [*Chambers v Trettco, Inc*, 463 Mich 297, 309; 614 NW2d 910 (2000) (emphasis added).]

Jager held that only employers are prohibited from discriminatory actions under article 2:

> Read as a whole, the CRA envisions, in our opinion, employer liability for civil rights violations that result from the acts of its employees who have the authority to act on the employer's behalf rather than individual liability for those civil rights violations. Further, had our Legislature intended individual, rather than employer, liability under the CRA, it could have expressly stated so. Thus, we conclude that the CRA provides solely for employer liability, and a supervisor engaging in activity prohibited by the CRA may not be held individually liable for violating a plaintiff 's civil rights. [*Jager, supra* at 485.]

Accordingly, in the context of employment discrimination, *employers* are prohibited from violating article 2 of the CRA and the "persons" prohibited from retaliating are *employers*.

This conclusion is further supported by the plain meaning of the term "retaliate," which is not expressly defined in the CRA. Therefore, it is appropriate to look to the common definition of retaliate. *Mahnick v Bell Co*, 256 Mich App 154, 162; 662 NW2d 830 (2003). Retaliate is defined as "to return like for like . . . to requite or make return for (a wrong or injury) with the like." Retaliate is synonymous with counter, repay, and reciprocate. *Random House Webster's Unabridged Dictionary* (2001). "To return like for like" requires that the interaction occur between two parties. The party acted against retaliates against the actor. One cannot retaliate if it was not first subject to an adverse act. In the employment discrimination context, retaliation

involves an employer that is subject to a discrimination claim taking adverse action against the employee who has engaged in a protected activity with regard to that claim.

In sum, a retaliation claim cannot exist independent of a prohibited discriminatory action under articles 2 through 5 of the CRA. As such, any claim for retaliation is related to another claim of discrimination under one of those articles. Because article 2 does not permit a cause of action against individuals for sexual harassment, within the context of employment discrimination, article 7 likewise does not provide a cause of action for retaliation against individuals. The retaliation claim that plaintiff claims to have alleged was against Baergen who was not her employer, but only had authority to act on her employer MTD's behalf. In my view, the CRA does not permit such a claim.

For these reasons, I would hold that the trial court did not err in granting summary disposition of plaintiff 's retaliation claim against defendants MDT and Baergen. I concur in all other aspects of the majority's decision.

/s/ Kirsten Frank Kelly